UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COLORADO FIRE SPRINKLER, INC.,	NLRB Case Nos. 27-CA-115977; 27-CA-120823

MOTION FOR REMAND TO REGION 27 FOR THE WITHDRAWAL OF UNFAIR LABOR PRACTICE CHARGES

Charging Party Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO ("Local 669"), has charged in Case Nos. 27-CA-115977 and 27-CA-120823 that Colorado Fire Sprinkler, Inc. ("Respondent"), has engaged in unfair labor practices in violation of the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq*.

Pursuant to Section 102.9 of the NLRB Rules and Regulations, Local 669 hereby moves that the Board remand to Region 27 to allow the withdrawal of the unfair labor practice charges in these cases.

As grounds for this Motion, Local 669 respectfully submits that the alleged misconduct in this case by Respondent occurred in 2013, over six (6) years ago; that the relevant collective bargaining agreement expired in 2013; that the litigation of this case may well continue on through another round of appellate court litigation which would consume another three (3) years; and that the primary economic remedy originally imposed by the NLRB, unpaid benefit contributions owed to the National Automatic Sprinkler Industry ("NASI") Funds, is currently being pursued by the NASI Funds in a separate withdrawal liability arbitration proceeding. *In the Matter of Arbitration Between Colorado Fire Protection, Inc. and the National Automatic Sprinkler Industry Pension Fund*, AAA Case No. 01-18-0004-3332. *See* Attachment 1.

Thus, continuing these unfair labor practice proceedings will be costly, time consuming and likely of limited practical significance. We therefore move that the Board remand the case to Region 27 to allow the charges to be withdrawn.

Dated: March 8, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2019, I electronically filed the foregoing document via the e-filing portal on the NLRB's website, and also forwarded a copy by electronic mail to:

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ATTACHMENT 1

American Arbitration Association

MULTIEMPLOYER PENSION PLAN ARBITRATION TRIBUNAL

In the Matter of the Arbitration between:

COLORADO FIRE PROTECTION, INC.

-and-

NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND

AAA Case No. 01-18-0004-3332

ANSWER

The Trustees of the National Automatic Sprinkler Industry Pension Fund (hereinafter, the "Fund"), by and through undersigned counsel, hereby object and respond to Colorado Fire Sprinkler, Inc.'s (hereinafter, "CFS" or the "Employer") letter of November 21, 2018, constituting its formal demand for Arbitration ("Demand") as follows:

OBJECTIONS

A. THE DEMAND FAILS TO ARTICULATE SPECIFIC DISPUTES WITH THE FUND'S ASSESSMENT OF WITHDRAWAL LIABILITY.

The Fund objects to the Demand in both form and substance due to the Demand's failure to articulate specific disputes with the Fund's assessment. The Demand broadly asserts that the Fund's withdrawal liability assessment is "based on unfounded assumptions and actuarial data replete with mathematical errors" and that it "disputes the Fund's determination of [CFS' withdrawal liability]." (See Demand at 3, 5.)

Accordingly, the Fund is unable to determine what substantive responses or procedural objections it can assert to CFS' disputes with the Fund's assessment. The Fund, therefore,

reserves the right to assert any such responses or objections discovered as the arbitration proceeds.

B. THE FUND OBJECTS TO THE EMPLOYER'S DEMAND THAT THE HEARING BE HELD IN DENVER.

Pursuant to Section 8 of the American Arbitration Association's Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes, the Fund objects to CFS' request that the hearing take place in Denver, Colorado. As the only dispute that CFS has raised relates to the actuarial assumptions and data underlying the Fund's withdrawal liability calculation, the hearing, if any, will involve one or more of Fund records, staff, actuaries, attorneys, and authorized agents. The Fund's sole administrative office containing its records and staff are located in the State of Maryland, and its attorneys and actuaries are based in Washington, D.C. Accordingly, the Fund's position is that the hearing, if any should be needed in this case, should take place in the Maryland/Washington D.C. metropolitan area.

RESPONSES

Without waiving the foregoing objections, the Fund responds as follows:

1. CFS RECEIVED NOTICE OF ITS WITHDRAWAL LIABILITY TIMELY AND THEREFORE HAS NO COLORABLE DEFENSE OF LACHES.

In its Demand, CFS baldly asserts that the Fund did not exercise sufficient diligence in notifying and demanding withdrawal liability. The chronology of events preceding the assessment, however, shows otherwise, and CFS' laches argument should fail.

By way of background, the Fund "primarily covers employees in the building and construction industry" within the meaning of ERISA § 4203(b)(1)(B)(i). CFS contributed to the Fund for work performed in the "building and construction industry," namely it "installs, services, and inspects fire sprinkler systems across commercial properties." See Colorado Fire

Sprinkler, Inc. v. NLRB, 891 F.3d 1031, 1036, 1038 (D.C. Cir. 2018).

ERISA § 4203(a) provides that an employer experiences a complete withdrawal when it permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan. An employer to whom the building and construction industry definition of a complete withdrawal applies experiences a complete withdrawal when it (A) ceases to have an obligation to contribute under the plan, and (B) either continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required *or* resumes such work within five years of the termination of its obligation to contribute without renewing same. ERISA § 4203(b)(2)(B). Irrespective of whether the employer continues performing work immediately after the cessation of its obligation to contribute or resumes such work within the five-year period thereafter, the date of the complete withdrawal "is the date of the cessation of the obligation to contribute or the cessation of covered operations." ERISA § 4203(e). "Obligation to contribute" is defined in ERISA § 4212(a), in pertinent part, as "an obligation to contribute arising (1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law."

ERISA § 4219(a)(1)(A) requires a plan to notify an employer of its withdrawal liability and demand payment of same as soon as practicable after the employer's withdrawal. Courts recognize, however, that "[i]n light of 'the complexity of the tasks imposed on the plan sponsor under the statute and Congress' clear intent to *help* plans collect withdrawal liability,'" no rigid time frame applies to this requirement. See Board of Trs. of Trucking Emps. of N. Jersey Welfare Fund, Inc. v. Canny, 900 F. Supp. 583, 594-95 (N.D.N.Y. 1995).

In this case, there was significant and time-consuming litigation over whether the

Employer continued to have an obligation to contribute to the Fund arising as a result of a duty under applicable labor management relations law. The first decision finding that the obligation to contribute had terminated was issued in June of 2018, and the Fund assessed withdrawal liability promptly thereafter.

More specifically, CFS was party to a collective bargaining agreement ("CBA") with Road Sprinkler Fitters Local Union No. 669 (hereinafter, the "Union") that expired on March 31, 2013. CFS contended that it was permitted to repudiate the bargaining relationship upon contract expiration pursuant to case law under section 8(f) of the National Labor Relations Act ("NLRA"). The Union, however, contended that its CBA was governed by section 9(a) of the NLRA such that CFS was not allowed to repudiate, had violated the law by doing so and by unilaterally changing terms of employment regarding benefits, and was therefore still bound to maintain the terms and conditions of employment set forth in the expired CBA including the obligation to contribute to the Fund.

In October 2013, the Union filed an unfair labor practice charge to that effect with the National Labor Relations Board ("NLRB"). In March 2015, the Administrative Law Judge held that CFS had a duty to bargain with the Union and ordered CFS to cease and desist from "[f]ailing and refusing to bargain collectively with [the Union]." Colorado Fire Sprinkler Inc., Case 27-CA-115977, JD-17-15 at 13-15 (NLRB Admin. J. Div. Mar. 23, 2015) (hereinafter, "ALJ Decision"). A copy of the ALJ Decision is attached as Exhibit 1 hereto. The NLRB affirmed in part, specifically affirming the ALJ Decision's holding that CFS had an on-going duty to bargain in good faith with the Union and ordered that CFS "*shall* be required to recognize and, on request, bargain with the Union as the collective-bargaining representative of all employees performing bargaining unit work, as set forth in the parties' most recent collective-

bargaining agreement." Colorado Fire Sprinkler, 364 NLRB No. 55 at 1-2 (2016) (emphasis added) (hereinafter, the "Board Decision"). A copy of the Board Decision is attached as Exhibit 2 hereto. Shortly thereafter, CFS petitioned for review with the United States Court of Appeals for the District of Columbia. In June 2018, the Court of Appeals found – for the first time by a decision-maker in the case – that CFS was privileged to repudiate the CBA; accordingly, the court vacated the Board's decision and remanded same. Colorado Fire Sprinkler, 891 F.3d at 1041.

It was not until the D.C. Circuit vacated the Board's decision that the Fund had sufficient grounds to determine that CFS' obligation to contribute – as defined in ERISA § 4212(a)(2) – had terminated and to identify "the date of the cessation of [CFS'] obligation to contribute [to the Fund]." ERISA § 4203(e). The Fund sent notice and demand of withdrawal liability under ERISA § 4219(b)(1)(A) to CFS seventeen days after the D.C. Circuit's decision. Accordingly, the full chronology in this matter shows that the Fund notified CFS "[a]s soon as practicable after [its] complete . . . withdrawal" such that a defense of laches cannot prevail.

Even assuming, for the sake of argument, that the Fund did not notify CFS "as soon as practicable," CFS experienced no harm by such time elapsed "because no interest accrued on the liability until the Fund mailed its notice and demand." Brentwood Fin. Corp. v. Western Conf. of Teamsters Pension Trust Fund, 902 F.2d 1456, 1461 (9th Cir. 1990); see also Canny, 900 F. Supp. at 595 (finding no prejudice to employer because no interest accrued until receipt of the notice and demand; concluding that "a six-year delay is not so unreasonable as to support a defense of laches").

CFS' asserted defense of laches, therefore, has no factual support and should not permit the Employer to avoid its statutory obligation.

2. INTERIM WITHDRAWAL LIABILITY PAYMENTS MUST CONTINUE AS A MATTER OF LAW.

In its Demand, CFS requests, as it has before, that the Fund suspend its obligation to make interim withdrawal liability payments during the pendency of arbitration and now cautions the Fund that it will consider all legal options if the Fund continues to deny this request. The Fund emphatically denies this request because CFS has a statutory obligation to make such payments while it exercises its statutory right to challenge same.

ERISA § 4221(d) clearly states that "[p]ayments *shall be made* by an employer in accordance with the determinations made under [ERISA §§ 4201-4225] until the arbitrator issues a final decision with respect to the determination submitted for arbitration." (Emphasis added.) By this statutory mandate, Congress "unambiguously established a 'pay now, dispute later' dispute resolution procedure designed to protect the financial stability of multi-employer pension plans from unnecessary risk caused by protracted delay in the collection of withdrawal liability payments." Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115, 119 (4th Cir. 1991); see id at 119-20 (discussing same and collecting cases). Consistent with this mandate, "the employer must satisfy a very high standard" to be absolved of this obligation. Board of Trs., Sheet Metal Workers Nat'l Pension Fund v. Courtad Constr. Sys, Inc., 439 F. Supp. 2d 574, 582 (E.D. Va. 2006).

CFS premises its request solely on conclusory statements. (See, e.g., Demand at 5.) This will not suffice. CFS must "pay now, dispute later," and continue paying until a final decision is rendered by the Arbitrator. As to the Demand's statement that the payments will cause the Employer hardship, the statutory scheme for assessing, collecting, and disputing withdrawal liability "provides adequate safeguards to ensure that an employer will promptly recover any overpayment [of withdrawal liability] in the lump sum with interest." Centra, 947 F.2d at 120;

see also Connors v. Brady-Cline Coal Co., 668 F. Supp. 5, 8 (D.D.C. 1987) ("One court, while recognizing that interim payments would destroy the liquidation value of the employer, found that it would be analytically unsound to adopt an approach that makes the outcome of the taking argument depend on the relationship between the value of the employer's assets and the amount of withdrawal liability asserted." (Internal citation and quotations omitted)).

In accordance with the principles above, CFS must continue making interim withdrawal liability payments pursuant to the schedule set forth in the Fund's demand, and any argument to the contrary conflicts with clear congressional intent.

CONCLUSION

For the reasons discussed above, the Fund denies that any defect exists with respect to CFS' withdrawal liability assessment and denies that CFS has any plausible defense of laches to avoid its statutory liability to the Fund. Furthermore, the Fund reiterates, for the avoidance of doubt, that CFS' request to suspend interim payments pending the resolution of this arbitration is denied, as CFS must satisfy its statutory obligation to pay its liability while it exercises its statutory right to dispute same through the instant arbitration. The absence of a response to any arguments, conclusory statements, or accusatory assertions, shall not be construed as expressing any position on the particular matter because this is not the appropriate medium for same.

Dated December 6, 2018

Respectfully submitted,

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